DOCUMENT RESUME

ED 234 456 CS 504 387

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TITLE Erosion of the At-Will Rule and Freedom of Communication in Private Sector Organizations.
PUB DATE Nov 83
NOTE 68p.; Paper presented at the Annual Meeting of the Speech Communication Association (Washington, DC, November 10-13, 1983).
PUB TYPE Information Analyses (070) -- Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Case Studies; Communication Research; *Court Litigation; *Employer Employee Relationship; *Employment Practices; *Labor Legislation; *Labor Relations; Legal Responsibility; *Organizational Communication
IDENTIFIERS *At Will Rule

ABSTRACT

The "at-will" rule in American law is defined as the right of a private sector employer to dismiss an employee without a contract for virtually any reason. The rule has thrived since the nineteenth century and is still a major factor in the employer-employee relationship. However, recent court decisions have fashioned common law exceptions to the rule in an effort to mitigate the harsh treatment of employees by their employers. A review of case law since 1966 reveals a certain pattern in the courts' handling of the rule. For example, only a small minority of states will allow a tort cause of action for wrongful discharge, and even fewer will entertain a breach of contract suit by an at-will employee. Further, most state courts seek a clear mandate of public policy grounded in statutes, administrative rules, or state constitutions as the basis of their decisions. In consideration of those cases where employees sought tort remedies for their dismissal, the courts have allowed them to pursue their actions when the employee had been fired for (1) refusing to commit an illegal act, (2) exercising a statutory right, (3) performing a statutory duty, or (4) acting in what he or she considered to be a public policy interest. The courts have also limited the rule through breach of contract actions, specifically in cases where employers have not shown good faith and fair dealing or have breached contracts in violation of public policy interests. (FL)

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EROSION OF THE AT-WILL RULE AND FREEDOM OF COMMUNICATION IN PRIVATE SECTOR ORGANIZATIONS

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Presented at the 69th Annual Meeting of the Speech Communication Association. November 10-13, 1983. The Washinton Hilton Hotel in Washington, D.C.

CS 504387

I. INTRODUCTION

Traditionally in American Law, a private sector employee without a contract for a specific term can be fired for a good reason, a bad reason, or no reason at all.[1] Given the competitive pressures of commerce and the occasional human failing of acting with caprice or malice, it should not be surprising that workers in this country have been fired for testifying after being subpoenaed in anti-trust suits,[2] refusing to grind markings off foreign steel and deliver it to customers who had ordered domestic steel,[3] serving on a jury,[4] reporting unsafe oil and gas pipe which was later taken off the market,[5] reporting gross accounting irregularities in a publicly regulated utility,[6] and other alarming reasons.

The rationale for such extensive employer freedom comes from a rule unique to American law called the at-will rule. The rule has thrived since the nineteenth century and is still a major part of the employer-employee relationship in all fifty states. However, recent courts have fashioned common law exceptions to the rule in an effort to mitigate the harsh treatment of employees by their employers.

The purpose of this paper is to examine the erosion of the at-will rule through common law exceptions and to determine what effects these modifications have on freedom of communication in private sector

organizations. In order to draw these conclusions, an exhaustive review of the case law from 1966 to the present was made.

A Brief History of the At-Will Rule

The at-will rule applies when there is no contract for a specific term between employer and employee. The rule, simply stated, is that an employee is free to quit at any time, and the employer is free to dismiss the employee at any time.

The rule was first described in detail by Horace Gray Wood in an extensive, and well received, treatise on the law of master and servant.[7] Wood's treatise broke from the then accepted English practice --and arguably the then current American practice--that all employment was presumed to be for one year and could be terminated only for cause. Cause generally refers to some aspect of job fitness or job performance. Woods wrote:

> With us the rule is inflexible, that a general or indefinite hiring is prima facia a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . . [I]t is an indefinite hiring and is determinable at will of either party, and in this respect there is no distinction between domestic and other servants.[8]

It is ironic that the rule, which is currently a powerful force, had a dubious beginning. Professor Jay Feinman of the University of Miami School of Law argues that Wood was careless in his development of the rule in this treatise:

> The puzzling question is what impelled Wood to state the rule that has become identified with his name. Wood's master and servant treatise, like his other works, won him acclaim for his painstaking scholarship, but that comprehensiveness and concern for detail were absent in this treatment of the duration of service contracts. First, the four American cases he cited in direct support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, that the employment at will rule was inflexibly applied in the United States, and that the English rule was only for a yearly hiring, making no mention of notice. Third, in the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed.[9]

Despite its scholarly shortcomings, the rule was quickly picked up by courts across the country. There are several theories on why this happened so rapidly but the most plausible is that the rule was consonant with the rapid industrialization of the country--built on cheap immigrant labor and the rise of liberty of contract and property rights.[10] The at-will rule even temporarily took on Constitutional legitimacy. In Adair v. United States the Supreme Court struck down a federal statute that prohibited common carriers from discharging or discriminating against employees because of union activities, on the grounds of unconstitutional interference with liberty of contract and property rights guaranteed by the Fifth Amendment.[11] Shortly thereafter the Court in Coppage v. Kansas

used the Fourteenth Amendment to overturn a Kansas statute which prohibited employers from demanding, as a condition of employment, that their employees not be members of unions.[12] However, the Constitutional protection of the at-will rule was discredited in NLRB v. Jones & Laughlin Steel Corp., where the Court upheld Congress's power to protect, by statute, union activity.[13] Thus the Court upheld the power of the federal government and the states to limit the at-will rule by statute. However, absent controlling statutes, the at-will doctrine maintains much of its earlier vitality.

During the last decade the at-will rule has come under increasing criticism. The catalyst was an essay by Lawrence Blades appearing in 1967. In it he advanced the theory that torts of wrongful discharge should be actionable in order to protect, ". . . individuals . . . in their highly vulnerable status as employees from the private establishments upon which they are becoming increasingly dependent."[14] Blades' thrust was primarily toward the protection of individuals and little was mentioned about the interests of public policy. During the next ten years, Blades' call was followed by many articles, almost all critical of the at-will doctrine.[15]

The criticism of the rule in legal literature has mirrored the sentiment of a number of courts who have established exceptions to the at-will rule on the basis of tort actions for wrongful discharge and breach of contract actions. These courts are found in a small but growing minority of states.

The common law erosion of the at-will rule is a recent phenomenon in an area of law in which rapid changes are rare. The trend is in its infant stages, and courts have been cautious in dealing

with the venerable rule. However, even at this early stage, certain patterns can be found. First, only a small minority of states will allow a tort cause of action for wrongful discharge. Even fewer will entertain a breach of contract suit by an at-will employee. Second, unlike Blades' call for protection of individuals, most courts look for specific mandates of public policy grounded in statutes, administrative rules, or state constitutions. Most state courts find a clear mandate of public policy only where an employee is fired for refusing to engage in criminal activity, exercising a specific statutory right, or fulfilling a statutory duty. Indirect expressions of public policy, such as an employee speaking out about unsafe products, are rarely viewed as adequate. Third, even the state courts which allow common law modification of the at-will rule vary considerably on their standards of what constitutes public policy. Fourth, many courts refer to a balance between the employer's interst in running the business as he or she sees fit and the interest of the State in public policy. However, in practice, the balancing test is rarely used. The key is usually whether or not the courts find a clear mandate of public policy. If they do, the employee is usually allowed to pursue the action. If not, the case is often summarily found for the defendant company. Finally, there is evidence of considerable judicial debate about the economic impact of employee rights. Some judges feel that exceptions to the at-will rule will cripple management; others feel that such exceptions will spawn frivolous suits by employees; and still others feel that exceptions to the rule will drive business out of their state and into other states where the at-will rule is absolute.

II. TORT REMEDIES

Employees who feel they have been wrongfully discharged have sought relief on both tort and contract theories. However, the favored approach seems to be based on a tort of wrongful discharge theory.

The tort approach seems to offer several advantages over the breach strategy. First, by using a tort strategy the limitations of the contractual principle of mutuality of obligation can be avoided. Many courts require that mutuality of obligation, or extra consideration, be present if an at-will employment relationship is to be subject to a breach of contract action.[16] ". . . [I]t has been reasoned that if the employee can quit his job at will, then so, too must the employer have the right to terminate the relationship for any or no reason."[17] The reasoning is that if an employer is willing to limit his/her right to dismiss an employee at will, then the employee should be required to offer something in addition to his/her paid labor. Although the symmetry of this concept is appealing, many employees are not in a position to offer something of value beyond their labor, and do not enjoy the bargaining power to demand a written contract which would force employers to act in a humane manner. A few courts have been sympathetic to the plight of at-will employees and have not demanded mutuality of obligation but, rather, have held that an employee's labor is all the consideration that is needed to pursue a breach of contract action.[18] Such courts are rare and represent hope to only a tiny fraction of the country's at will employees. However, mutuality of obligation does not trouble all common law

remedies. Since tort of wrongful discharge actions are based on tort theory and not contract theory, there is no need to prove mutuality of obligation and that whole issue can be avoided.

The second advantage to the tort approach is that ". . . punitive damages are normally recoverable in tort, but not in contract actions. Since the purpose of punitive damages is to punish the defendant and to deter others from engaging in similar conduct, forcing employers found guilty of wrongful discharge to pay exemplary damages would further the interests of both the employee and the community."[19]

The types of situations where courts have allowed employees to pursue tort of wrongful discharge actions are: (1) where an employee refuses to commit an illegal act such as perjury, (2) where an employee exercises a statutory right such as filing a workmen's compensation claim, (3) performing a statutory duty such as keeping a pharmacy open at all times required by statute, and (4) non-statutory public policy actions where an employee may not necessarily be asked to do something illegal, has no statutory right or duty, but advances public policy. For example, a bank employee complaining to his superiors that certain bank procedures are in violation of consumer credit laws would fall into this category.

Refusal to Commit an Illegal Act

Perhaps the most ugly outgrowth of the at-will rule occurs when organizations order their employees to break the law, under threat of dismissal. It should not be surprising that this was the first area where courts sought to buffer the harshness of the at-will rule.

The first case to recognize a common law remedy for a wrongfully discharged at will employee was Petermann v. International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 396.[20] It arose when the business agent for Local 396, Peter Petermann, alleged that he was ordered by Frank Natula Jr., the secretary-treasurer of the union, to make false and untrue statements when Petermann was subpoenaed to testify before a committee of the California Legislature.

Justice Fox, writing for California's Second District Court of Appeal, found that: "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge an employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute."[21] In addition to the public policy exception, Fox hinted that damages might be established on the contract issue of good faith. Fox pointed out that Petermann was hired for, ". . . as long as his work was satisfactory," and that the day before the hearing, ". . . [Petermann] was informed by Natula that 'his work was highly satisfactory'."[22] Fox held that the question as to whether Petermann was fired in good faith dissatisfaction with his services or for other reasons was one for a jury.

In Trombetta v. Detroit, Toledo & Ironton Railroad Company a railroad employee claimed that he had been fired, ". . . when he refused to manipulate and adjust sampling results used for pollution control reports which were filed with the state. . . ."[23] Judge Gillis, writing for Michigan's Court of Appeals, held that if Frank

Trombetta had been forced to alter the reports, "[s]uch action would violate the law of [the] state."[24] However, he affirmed the summary judgement for the railroad because, ". . . the trial judge found no material issue of fact had been presented. Plaintiff's failure to submit any proof which would qualify as admissable evidence at trial to contradict the sworn statements made by defendant's agents contributed to the court's findings."[25]

In Tameny v. Atlantic Richfield Company a retail sales representative claimed that he had been, ". . . pressured by [Arco's District Manager, J.C. McDermott and others] to 'threaten [and] cajole the so-called independent service station dealers in [his] territory to cut their gasoline prices to a point at or below a designated level specified by Arco.' When [Tameny] refused to yield to his employer's pressure to engage in such tactics, his superiors told him that his discharge was imminent, and soon thereafter [Tameny] was fired . . . ."[26] Tameny claimed that such behavior would be in violation of the express provisions of the Sherman Anti-trust Act, California's Cartwright Act, and a specific consent decree which had been entered in a federal anti-trust prosecution against Arco.[27]

Justice Tobringer, writing for the Supreme Court of California, rejected Arco's argument that a breach of contract action and not a tort action was appropriate. Justice Tobringer held that, ". . . an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by

law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer."[28]

In addition, Justice Tobringer held that a tort or a breach of contract action may be pursued in similar circumstances: "California decisions have long recognized that a wrongful act committed in the course of contractual relationship may afford both tort and contractual relief, and in such circumstances the existance of a contractual relationship will not bar the injured party from pursuing redress in tort."[29]

These cases seem to bring relief for employees who are asked or expected to engage in criminal activity. Yet, these protections only seem to apply where employees are asked or forced into activities specifically proscribed by statute. In addition, the employee must be lucky enough to be in a state which recognizes exceptions to the at-will rule. In the cases which follow, employees were not allowed to pursue a tort of wrongful discharge action despite circumstances which, if true, seem to be corrupt abuses of corporate power.

In Percival v. General Motors, the United States District Court for the Eastern District of Missouri,[30] and later the Eighth Circuit Court of Appeals,[31] could not find any clear public policy when a former General Motors executive claimed that he had been fired for attempting to correct false impressions in what he called an "Industrial Watergate."[32]

Worth Percival claimed that he was forced to leave GM because of his, ". ... age; the need of immediate supervisors for a scapegoat to assuage GM President Cole's anger over what he considered misdirected

research involving the swashplate engine; and retaliation taken by GM's top management against plaintiff for his efforts, both within and without the corporate structure, to correct misleading, if not fraudulent statements (fifteen 'incidents of public lying') made by GM regarding its work on alternative power plants."[33] He claimed that this constituted a possible violation of security laws.

Chief Justice Meredith found that the case was unlike Petermann in that there was no direct call for specific illegal action on the part of Percival. The Court found guidance in the Pennsylvania case of Geary v. United States Steel, where a firing, allegedly in retaliation for complaints to superiors about unsafe pipe products, was found to be insufficient for a claim of public policy violations.[34] Meredith held that, even though Percival, ". . . notified the SEC of GM's misleading statements to the public . . . he did not inform GM of this action until after his separation from employment was final" and therefore, "[t]he mere fact that the discharge was unjustified does not give rise to a cause of action in the absence of contractual, statutory, or public policy considerations."[35]

Judge Meredith also examined the rationale in the 1974 case of Monge v. Beebe Rubber Company where the New Hampshire Supreme Court recognized a non-statutory general public policy interest in preventing a female employee from being fired because she refused to have sexual relations with her foreman, who was a friend of the employer's personnel manager,[36] but decided to adopt Pennsylvania's more conservative course laid down in Geary v. United States Steel.

Judge Henley of the Eighth Circuit Court of Appeals examined the District Court's rationale and affirmed the decision.[37]

It is interesting to note that the Court would not protect the general public policy interest even though Percival cited cases of, ". . . false and misleading information being conveyed to stockholders in annual reports and fliers to the general public in nation-wide full-page newspaper advertisements; of his efforts to correct such misleading information in a letter to a corporate superior, all copies of which were shredded; and of receiving a reprimand for conveying truthful information to representatives of another corporation with whom GM was negotiating renewal of a joint venture in the development of an alternative power plant."[38]

A similar case came before the Washington Supreme Court sitting en banc. In Roberts v. Atlantic Richfield Company John Roberts, a manager for Arco, claimed that he was terminated because of his age and his participation in and awareness of 'cross billing' procedures which were in violation of the Federal Energy Administration's system of mandatory gasoline allocation, in force due to the crisis brought on by the Arab Oil Embargo.[39] It is ironic that Arco transferred and then fired Roberts for, ". . . actions in violation of company policy and F.E.A. regulations."[40]

Justice Stafford affirmed Arco's directed verdict, holding that: "Appellant [did] not suggest that he was discharged for exercising a statutory right or that his termination resulted from a refusal to engage in criminal activity such as perjury. Thus his discharge was not wrongful under the retaliatory discharge exception . . ." to the at-will rule.[41]

Stafford also examined the rationale found in Monge v. Beebe Rubber Company and found that it did not apply, but did suggest that the reasoning be fully examined in subsequent cases.[42] He wrote:

"On the record before us we can neither reach the question of whether we should totally abrogate the common law terminable-at-will doctrine nor the question of whether we should follow the Monge court and make an exception thereto based on bad faith and malice. While the future of this doctrine is a compelling issue, it is one that must be left for another day and different facts."[43]

In Phillips v. Goodyear Tire & Rubber Company, the United States Fifth Circuit Court of Appeals illustrated the harshness of the at-will rule in states which do not recognize public policy exceptions.[44] Ira Phillips, who had worked for Goodyear since 1958, was the Assistant Region Manager-Retail based in Atlanta. He had previously been the District Manager in Houston, Texas. Phillips alleged that he had been fired by Goodyear, ". . . in retaliation for giving truthful deposition testimony in the Texas Tire antitrust litigation [a suit against Goodyear in the federal district court in Houston] that was harmful to Goodyear's interest."[45] In the district court trial, a jury, ". . . found that 'the real and only reason for [Phillips' discharge by Goodyear] was testimony he gave in the [Texas Tire antitrust] case,' and that Phillips 'would not have been discharged but for such testimony'."[46] Phillips was awarded $400,000 in compensatory damages.

Judge Williams, writing for the Fifth Circuit Court of Appeals, reversed the district court's decision on the grounds that there was ". . . no reasonable basis in either Georgia or Texas law for prediction that either state would adopt the 'public policy' exception to the at-will rule still recognized in only a small minority of states. The courts of Georgia and Texas have consistently held to the at will doctrine."[47] Williams lamented on the harshness of strict adherence

to the rule by the two States:

> We are mindful of the strong public policy in favor of protecting those who fulfill their duty to testify truthfully in court proceedings. Moreover, we are cognizant of the possibility that these facts present a more compelling case for recognition of the 'public policy' exception than those which the Georgia and Texas Courts have confronted. However, we also realize that the at will rule is itself grounded in important, although arguably outmoded, considerations of public policy.[48]

In a dissent, Judge Brown argued that the Georgia Supreme Court, through the process of certification, should decide whether an exception to the at-will rule should be made. Judge Brown felt that such a dismissal deserved an exception to the at-will rule:

> The Court's opinion proceeds expressly on the assumption 'that the sole reason for Phillips' termination was that he gave truthful testimony harmful to Goodyear's interest or that he refused to perjure himself' . . . . Considering that the alleged retaliatory action by Goodyear was in violation of the express prohibitions of 18 U.S.C. § 1503 as well as Texas Penal Code § 36.06(a) (in which state part of the testimony was given) I cannot believe that, in these enlightened times, the Supreme Court of Georgia code (§ 66-101) or its prior decisions would close the book for all time on this new but stark, shocking claim.[49]

In the 1982 case of Gil v. Metal Service Corporation, a manager-supervisor of Metal Service Corporation was fired for refusing to supervise or perform the removal of, ". . . identification marks from foreign steel and delivering it to their customers, although they specified domestic steel orders;"[50] an act which Rudy Gil claimed was "in furtherance" of deceptive trade practices prohibited by Louisiana law.

Judge Ward, writing for the Fourth Circuit Court of Appeals of Louisiana, held that the deceptive trade practices law, ". . . has been construed to give protection only to customers and business competitors."[51] He then rejected Gil's tort claim by holding: "Courts in many of the United States have held that an employee cannot be terminated for refusal to perform an illegal act, even in the absence of a statute. However, because of Louisiana's traditional and unique deference to legislative authority, these decisions cannot act as precedent."[52]

These cases illustrate central problems in using tort remedies to protect communication in private organizations. First, most employees do not have any protection because they work in states which do not allow tort exceptions to the at-will rule. Second, most courts require a specific, statutorily defined statement of public policy before tort of wrongful discharge actions are allowed. In these cases the public policy was found in laws against perjury, price fixing and so forth. Where employees were not forced to engage in illegal communication but simply complained about illegal or immoral actions by their companies, relief was rarely allowed.

Exercising a Statutory Right

A second type of situation where courts have allowed a tort cause of action exception to the at-will rule is where employees are thwarted from exercising statutorily guaranteed rights by the threat of dismissal. Many of the rights have little to do with communication. Wrongful discharge torts are not bound by the artificial confines which imprison the free speech and organizational communication scholar. These non-communication cases are included here for two reasons. First, familiarity with the rationale expressed in statutory right cases is important for understanding developments throughout tort of wrongful discharge law. Second, the role served by tort of wrongful discharge actions in stopping employers from circumventing statutes in general has important implications for the growing body of state laws which prohibit employer interference with the speech and assembly rights of their employees, especially during off duty hours.[53]

The cases in this section illustrate how employers have attempted to thwart the will of the legislatures by using exemplary dismissals to chill the exercise of statutorily declared employee rights.

The case of Frampton v. Central Indiana Gas Company marked the first time that a tort action exception to the at-will rule was recognized in a workmen's compensation case.[54] Dorothy Frampton alleged that she had been fired in retaliation for filing a workmen's compensation claim based on an arm injury.

Justice Hunter, writing for the Indiana Supreme Court, found that, ". . . in order for the goals of the [workmen's compensation] Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being

subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined."[55] Justice Hunter reasoned, by analogy from landlord and tenant law, that retaliatory dismissals should be treated like retaliatory evictions: "Retaliatory discharge for filing a workmen's compensation claim is a wrongful, unconscionable act and should be actionable in a court of law . . . . We further hold that such a discharge would constitute an intentional wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages."[56] Hunter then reversed a lower court's dismissal of the case and remanded it.

In Sventko v. Kroger, the Court of Appeals of Michigan similarly recognized a cause of action for a dismissal in retaliation for filing a workmen's compensation claim.[57] Donna Sventko alleged that she had been terminated and would not be allowed to return to work while recovering from an injury for which she filed a workmen's compensation claim.

Judge Holbrook, writing for the Court, ruled that even though there were statutory prohibitions only against "consistent dismissal" (which were designed to prohibit employers from dismissing employees before they are qualified under the Act), ". . . discouraging the fulfillment of this legislative policy by use of the most powerful weapon at the disposal of the employer, termination of employment, is obviously against the public policy of this state . . . . That the workmen's compensation statute does not directly prohibit a retaliatory discharge by employers does not hinder this opinion."[58]

Judge Allen concurred for different reasons but warned:

> Potentially, our decision in this case opens the door to abuse by allowing spurious allegations of discharge solely because of the filing of a claim and a trial where the jury sympathies will lie in favor of plaintiff. But much of the abuse may be avoided if, at the time of discharge, the employer sets forth reasons clearly establishing that no attempt was made to dissuade the injured employee from filing a claim and that the reasons for not returning the employee to work were in no way retaliatory.[59]

In addition, Chief Judge Danhof offered a dissent. Clinging to the at-will rule, Judge Danhof accused the Court of engaging, ". . . in judicial legislation."[60]

In Leach v. Lauhoff Grain Company, the Fourth District Appellate Court of Illinois found that the dismissal of Daniel Leach, allegedly in retaliation for his filing of a workmen's compensation claim, could give rise to a tort cause of action.[61] Justice Craven ruled that: "Retaliatory discharge by an employer is contrary to the expressly stated public policy of this state and gives rise to a cause of action in tort for compensation and punitive damages."[62]

On the same day as the Leach v. Lauhoff Grain Company decision was handed down, another panel of the same court reversed the decision of a trial court which awarded Marilyn Jo Kelsay $749 in compensatory and $25,000 in punitive damages after she had been fired by Motorola shortly after filing a workmen's compensation claim. In Kelsay v. Motorola, Inc. the Illinois Supreme Court resolved the intracourt conflict suffered by the Fourth District Court of Appeals.[63] Justice Ryan, writing for the Illinois Supreme Court, held that a tort cause of action could be pur-

sued despite the criminal penalties against the employer and the lack of civil remedies outlined in the workmen's compensation act. Justice Ryan wrote: "We cannot believe that the legislature, even in the absence of an explicit proscription against retaliatory discharge, intended . . . that employees, . . . whose common law rights have been supplanted by the Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common law or statutory."[64] He went on to point out that in Illinois, the criminal sanction in the workmen's compensation act is classified as a petty offense with a penalty of a fine not to exceed $500.[65]

Justice Underwood dissented, arguing that the legislature and not the courts should decide on whether there should be exceptions to the at-will rule and if so, what those exceptions should be.

In Shanholtz v. Monongahela Power Co. the Supreme Court of Appeals of West Virginia ruled that a tort cause of action is appropriate when an employee is fired for filing a workmen's compensation claim.[66] The case arose when a maintenance man was injured when the cart on which he was riding was driven into a door. He alleged that he was fired three weeks after he filed a workmen's compensation claim.

However, the case is interesting for two other questions. The first is whether the cause of action sounds in tort, contract, or both. The issue is important because in West Virginia there is a five year statute of limitations on breach of oral contract actions and a two year statute of limitations on tort actions.[67] Justice Caplan, writing for the Court, held that: "Only by a tortious act could a cause of action acrue to the plaintiff. The wrong done, if any, is not the act of discharging the plaintiff (the employer had that right under the alleged

at-will employment contract), but the act of contravening public policy in carrying out such a discharge."[68] Shanholtz had not filed before the deadline and therefore could not maintain a tort or breach of contract cause of action.

The second interesting aspect of the case is the empassioned dissent of Chief Justice Neely, who could not participate in the earlier Harless v. First National Bank in Fairmont, West Virginia case, where another exception to the at-will rule was made.[69] Justice Neely was concerned about the damage that might be done to the free enterprise system when he argued:

> While it may be just in the grand scheme of things to protect employees who urge their employers to be honest it is unjust to the economic system to foster nuisance suits which will undermine efficiency, raise costs, and destroy morale by leaving inferior employees in place because employers fear litigation.
>
> Judges must be circumspect about the long run effects of general rules on the actions of people outside of the litigation process. A free enterprise, private sector economy is predicated upon there being winners and losers in the competitive process. Successful competition on the part of one person or firm generally results in unsuccessful competition on the part of another person or firm. Discharge is a most unpleasant experience regardless of its reasons and in general it engenders bitterness. The injustice to employers by encouraging frivolous litigation outweighs any justice to the very rare employee who is discharged for his honesty.[70]

In Lally v. Copygraphics the Supreme Court of New Jersey ruled that an employee, discharged in retaliation for filing a workmen's compensation claim, could maintain a tort cause of action despite the availability of other statutory remedies.[71]

Jo Ann Lally was injured while working at the Copygraphics plant. She alleged that she was fired after having been told that her medical bills would not be paid. She filed a workmen's compensation claim on the day of the discharge.

In a per curium opinion, the Court ruled that: ". . . a plaintiff has a common law right of action for wrongful discharge based upon an alleged retaliatory firing attributable to the filing of a workers' compensation claim and that, in addition to, or in lieu of, a judicial cause of action for civil redress there are available both statutory penal sanctions in a disorderly persons proceeding in municipal court and administrative relief before the Commissioner of Labor and Industry, who has concurrent jurisdiction over such a dispute."[72]

In Clifford v. Cactus Drilling Corporation[73] the Court of Appeals of Michigan extended the "chilling effect" argument presented earlier by the same Court in Sventko v. Kroger.[74] The case arose when Kevin Clifford, an employee of Cactus Drilling, allegedly was fired the day after he called in sick suffering from a recurrence of pain caused by a work related injury for which he had earlier received five weeks of workers' compensation benefits. The case was summarily dismissed by a lower court.

In a per curium opinion, the Court held that:

> . . . permitting an employer to fire an employee for absences due to a compensable claim under the Workers' Disability Compensation Act would have a chilling effect on the filing of such claims. Public policy, therefore, dictates the opposite result. Inasmuch as it is the policy of the state that injured employees be fully compensated for their work-related injuries, the firing of such employees on account of their absence from work while recovering from their injuries does violate the established public policy of this state.[75]

Judge Burns disagreed with the Court's interpretation of its own decision in Sventko and argued that the firing was not in retaliation for filing a claim. He wrote: "In Sventko v. Kroger . . . , this Court held that an employer could not fire an employee in retaliation for the employee's filing of a workers' compensation claim. On the other hand, in the present case, plaintiff's principle allegation is that he was fired because of his injury-related absence from work. This situation does not qualify as an exception to the general rule."[76]

These statutory rights cases show that some courts are willing to entertain tort of wrongful discharge actions. However, one must not forget the limitations on this very narrow exception to the at-will rule. Only a few states will allow the wrongful discharge tort action, even where workmen's compensation laws are clearly thwarted by the chilling effect of worker dismissals.[77]

In their dissents, some judges offered warnings which might be heeded in other types of situations where public policy is not

as clear as when workers are forced to engage in criminal activity or are threatened with dismissal for filing workmen's compensation claims. These warnings generally addressed two themes. The first is that exceptions to the at-will rule will lead to spurious lawsuits and that a real potential exists to drive industry away. Judge Allen's concurring opinion in Sventko v. Kroger, Co.[78] and Chief Justice Neely's dissent in Shanholtz v. Monongahela Power Co.[79] both alluded to the economic impact and cautioned against exceptions to the at-will rule.

The second theme is similar to the general refusal of other states to allow any exceptions to the at-will rule. The dissents of Chief Judge Danhof in Sventko v. Kroger, Co.[80] and Justice Underwood in Kelsay v. Motorola[81] both warn that it is the job of the legislatures and not the courts to decide whether there should be exceptions to the at-will rule and what those exceptions should be.

Fulfilling a Statutory Duty

A third type of exception to the at-will rule is a tort cause of action for wrongful discharge where an employee is fired for attempting to fulfill a statutory duty. What is interesting in these cases is the construction of public policy. Many of the early cases involved jury duty. Although few people are fined or jailed for refusing jury service, the courts felt that it was an important public policy, as defined by statute. In other cases, not involving jury service, the courts seemed to place weight on the possibility of criminal or civil action against the employee. However, in all cases, great weight was placed on public policy specifically defined

by statute or judicial decision. In other words, the key factor in establishing public policy is not showing great possible harm to the public but rather showing that the employee was under a statutory or judicial duty to act in the public interest.

In Nees v. Hocks the Oregon Supreme Court held that the duty of jury service is an important public function and that an office clerk, fired because she accepted jury service, could maintain a tort cause of action against her employer.[82] Hocks Laboratories gave Vickie Nees a letter requesting that she be excused from jury service, after she had been subpoenaed. Nees presented the letter to the court clerk but also said she would like to serve. The clerk refused to excuse Nees. After her jury duty, Nees was terminated.

Justice Denecke, writing for the Court, held that:

> . . . [A]ctions by the people, the legislature and the courts clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted. For these reasons we hold that the defendants are liable for discharging plaintiff because she served on a jury.[83]

In Reuther v. Fowler & Williams, Inc. an employee was allegedly fired for taking a week off to serve on jury duty.[84] Judge Spaeth,

writing for the Superior Court of Pennsylvania, held that: ". . . the law of this Commonwealth recognizes a cause of action for damages resulting when an employee is discharged for having performed his obligation for jury service. The jury system and jury service are of the highest importance to our legal process."[85] He then remanded the case, which had been ruled a "non-suit" by the Court of Common Pleas, Lackawanna County, with directions that the "non-suit" be taken off.

In the case of Sheets v. Teddy's Frosted Foods, Inc. the Connecticut Supreme Court recognized, for the first time in that state, a tort claim for wrongful discharge of an at will employee.[86] Emard Sheets was employed by Teddy's Frosted Foods as, ". . . its quality control director and subsequently also as its operations manager."[87] He alleged that he was fired for making complaints to his superiors concerning deviations from specifications on the labels of vegetable and meat products which violated the Connecticut Uniform Food, Drug, and Cosmetic Act.[88]

Justice Peters, writing for the Court, held that the trial court was in error in granting the defendant's motion to strike and that Sheets could maintain a tort cause action. There are two interesting features in Peter's analysis. First, he contrasted Sheet's complaints with a salesman's complaints about unsafe pipe products in the Pennsylvania case of Geary v. United States Steel,[89] ". . . because as a company salesman, he had neither the expertise nor the corporate responsibility to 'exercise independent, expert judgement in matters of product safety.' By contrast, this plaintiff unless his title is meaningless, did have responsibility for product quality control."[90] Secondly, Peters refused to close the door on the possibility of a

cause of action not based on a specific statute: "We need not decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy . . . . For today, it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment."[91]

Chief Justice Cotter offered a spirited dissent. Cotter argued that the firing of Sheets presented little danger to the Food, Drug, and Cosmetic Act. He suggested that Sheets, ". . . if he desired to protect the consumer could have communicated even anonymously, to the commisioner of consumer affairs his concerns that his employer was violating the Food Drug and Cosmetic Act so as to invoke the statute's enforcement mechanisms . . . and have avoided the exceedingly remote possibility of criminal sanctions . . . ."[92]

Cotter went on to warn that, ". . . to base this new cause of action on a decision as to whether an alleged reason for discharge 'is derived from some important violation of public policy' is not to create adequate and carefully circumscribed standards for this new cause of action but is to invite the opening of a Pandora's box of unwarranted litigation arising from the hope that the judicial estimate of derivation, importance, and public policy matches that of the plaintiff."[93]

In Palmateer v. International Harvester Company the Illinois Supreme Court recognized crime fighting as a duty.[94] Ray Palmateer alleged that he was fired, ". . . for supplying information to a local law enforcement agency that an [International Harvester] employee might be violating the Criminal Code, for agreeing to gather further evidence implicating the employee, and for intending to testify at the employee's

trial, if it came to that."[95]

Justice Simon, writing for the Court, characterized the at-will rule as, ". . . a harsh outgrowth of the notion of reciprocal rights and obligations in employment relationships . . . ,"[96] and then held that:

> No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. 'Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy . . . .' Once the possibility of crime was reported, Palmateer was under a statutory duty to further assist officials when requested to do so.[97]

Simon reversed the dismissal of the case by lower courts and remanded the case back to the Circuit Court of Rock Island County for trial on the tort cause of action.

Justice Ryan wrote a lengthy dissent, which Justice Underwood shared. Ryan sharply criticized extending retaliatory discharge torts, ". . . into the nebulous area of judicially created public policy. . . ."[98] He warned:

> I fear that the result of this opinion will indeed fill the prophesy of Mr. Justice Underwood's dissent in Kelsay. 'Henceforth, no matter how indolent, insubordinate or obnoxious an employee may be, * * * the employer may there-

> after discharge him only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages . . . ."[99]

He went on to warn that the Court's opinion would, ". . . further contribute to the declining business environment [of Illinois] by creating a vague concept of public policy."[100]

In Kalman v. Grand Union Company a New Jersey appellate court found that a pharmacist had a duty, grounded in statutes and professional ethics, to demand that a pharmacy in a grocery store comply with the rules of the State Board of Pharmacy.[101]

Sidney Kalman alleged that he was informed that the pharmacy section of his grocery store would be closed on Independence Day while the rest of the store would be open. Kalman objected to his superior, ". . .citing not only the state regulations but also the possibility that his own license might be suspended or revoked."[102] His supervisor agreed to check with the Board of Pharmacy and claimed that they had given permission for the pharmacy to be closed. Kalman, disbelieving his supervisor, telephoned the Board of Pharmacy and found that his pharmacy was to remain open. He complained again to his supervisor, who then assigned another pharmacist to keep the pharmacy open on Independence Day. The next day, Kalman was fired with no explanation.

Judge Francis, delivering the opinion of the Court, held that: ". . . the plaintiff's discharge, if it resulted from defendant's actions as alleged by plaintiff, conflicts with two sources of public policy: (1) the statutory scheme required a pharmacist on duty whenever defendant's premises were open and (2) plaintiff's professional code of ethics."[103] It is interesting to note that Francis distinguished the ethics of

Kalman, which were grounded in public policy, from the ethics discussed in the earlier Pierce v. Ortho Pharmaceutical case, where a researcher's reliance on the Hippocratic Oath was held to serve only the interests of the profession and not the interests of a "clear mandate of public policy."[104] Francis argued that Kalman, ". . . was not motivated by his personal values or conscience but rather by his perception of his professional obligations [to not expose] the public to the risk that dangerous drugs might be accessible to the public if no pharmacist were present."[105] The case, which had been appealed from a summary judgement, was remanded.

From these statutory duty cases, it is apparent that some courts are careful not to strain the definition of public policy. In Sheets v. Teddy's Frosted Foods, Inc. and Kalman v. Grand Union Company[107] the courts depicted the employees as being faced with losing their jobs or facing various penalties for not performing their statutory duties faithfully. Yet, in Nees v. Hocks,[108] Reuther v. Fowler & Williams,[109] and Palmateer v. International Harvester Company[110] there was little danger of state imposed penalties if the employees did not fulfill their duty, but the courts felt that the public policies were important enough to protect. In an interesting theory, perhaps born out of wishful thinking, Justice Cotter, in his Sheets v. Teddy's Frosted Foods dissent, suggested that employees could keep their jobs and the public would be served if they would "leak information" to regulators and avoid confrontations with their employers.[111] Cotter's plan might be practical, save for the states which allow employers to submit their employees to polygraph testing in an effort to root out "information leakers."[112]

Apart from Chief Justice Cotter's interesting theory, the dissents

addressed familiar themes. In Justice Ryan's dissent, in Palmateer v. International Harvester Company, the courts were again warned that legislation should be left to the legislatures, and that acceptance of a tort cause of action for wrongful discharge would open the door to spurious lawsuits and would threaten the economic systems of the states.[113]

Actions in the Spirit of General Public Policy

The previous cases reviewed were carefully based on what the courts considered a specific statutorily defined public policy interest. However, in this section, cases based on a general public policy interest and not the direct expression of a right, a duty or a crime, will be reviewed. These cases seem to offer the greatest concentration of classic free speech issues. Unfortunately for most dismissed employees, the courts are reluctant to allow tort of wrongful discharge cause of actions where an employee is not asked to break the law, forsake a right, or abandon a duty.

In Harless v. First National Bank in Fairmont the Supreme Court of Appeals held, for the first time in West Virginia, that, ". . . where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge."[114] The case arose when John Harless, the Office Manager of the First National Bank in Fairmont's Consumer Credit Department, alleged that he was fired, brought back, demoted, and fired again in retaliation for his complaints to two vice-presidents, a member of the Board of Directors, a bank committee, and the bank's auditor, about the bank's overcharging customers on prepay-

ment of installment loans in violation of state and federal consumer credit laws. The facts involved a complicated scenario of events which lasted over a year.

After a careful review of the case law developed in other states, Justice Miller, writing for the Court, ruled that: "Such manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge."[115] Miller reversed a lower court which had dismissed the case for lack of a cause of action.

The case went back to the trial court, where the complicated issue of damages was addressed. Eventually, the case returned to the Supreme Court of Appeals for West Virginia where Chief Justice Miller, writing for the Court, adjusted the retaliatory discharge damages and dismissed a tort of outrageous conduct action.[115]

In Murphy v. American Home Products Corporation the Supreme Court, Special Term for New York County refused to summarily dismiss a cause of action for wrongful discharge even where no specific statute applied.[117]

The facts of the case, if true, are particularly alarming. Joseph Murphy was an officer, Assistant Treasurer, and an employee of 22 years. He alleged that he was transferred and demoted after reporting illegal accounting practices designed to present a fraudulent picture of the company's growth in income; something he was required to do by the company's own rules. His direct superior submitted one of Murphy's reports to top management, and was summarily dismissed. When Murphy brought up the subject again he was discharged in a particularly harsh manner.

> He was told that he did not know what he was talking about, discharged, and ordered to leave at once. Moreover . . . . when he returned the next day for his belongings, he was placed under guard, barred from saying goodby to his colleagues, told that his belongings had been taken from his desk (allegedly by breaking the lock) and publicly escorted out of the building; two weeks later, when he came, as directed, to collect his possessions, he was summarily ordered out of the building, and his possessions dumped on the street beside him.[118]

The Court felt that there should be a trial on the merits of the case under a cause of action for wrongful discharge.

However, not all employees who speak out enjoy the opportunity to present a tort cause of action for wrongful discharge. Most courts feel that employers should be free to deal with the communicative behavior of their employees as they see fit.

In Geary v. United States Steel Corporation the Supreme Court of Pennsylvania ruled that a salesperson and a 14 year employee of U.S. Steel, who allegedly was fired for complaining about the safety of pipe being sold to the oil and gas industry, could show no clear mandate of public policy which would balance against U.S. Steel's interest in being free from controversy.[119]

George B. Geary's dismissal was said to be a result of his complaints about a high pressure tubular casing being marketed to the oil and gas industry.

Geary alleges that he believed the product had not been

> adequately tested and constituted a serious danger to anyone who used it; that he voiced his misgivings to his supervisors and was ordered to "follow directions," which he agreed to do; that he nevertheless continued to express his reservations, taking his case to a vice-president in charge of sale of the product; that as a result of his efforts the product was re-evaluated and withdrawn from the market; and that he at all times performed his duties to the best of his ability and always acted with the best interests of the company and the general public in mind; and that because of these events he was summarily discharged without notice.[121]

Justice Pomeroy, writing the carefully phrased opinion of the Court, upheld the dismissal of Geary's claim by lower courts on the grounds that U.S. Steel did not fire Geary with the intent to cause harm or accomplish an ulterior purpose and that there was no clear mandate of public policy involved. Justice Pomeroy wrote:

> There is nothing here from which we could infer that the company fired Geary for the specific purpose of causing him harm, or coercing him to break any law or otherwise to compromise himself. According to his own averments, Geary had already won his own battle with the company. The most natural inference from the chain of events recited in the complaint is that Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house.[120]

Justice Pomeroy pointed out that Geary's job was not involved in product safety and that he may have been inappropriate in his complaints.

> The problem extends beyond the question of individual competence, for even an unusually gifted person may be of no use to his employer if he cannot work effectively with fellow employees. Here, for example, Geary's complaint shows that he by-passed his immediate superiors and pressed his views on higher officers, utilizing his close contacts with a company vice-president. The praiseworthiness of Geary's motives does not detract from the company's legitimate interest in preserving its normal operational procedures from disruption. In sum, while we agree that employees should be encouraged to express their educated views on the quality of their company's products, we are not persuaded that creating a new non-statutory cause of action of the sort proposed by appellant is the best way to achieve this result.[122]

Justices Nix, Manderino, and Roberts dissented. In the only dissenting opinion, Roberts argued that Geary's, ". . . suggestions that the unsafe steel pipe be withdrawn from the market to protect both the public from danger and his employer from liability was in complete harmony with his employer's best interest."[123] Roberts even went so far as to suggest that Geary had a duty, under agency law, to give his employer, ". . . information which is relevant to affairs trusted to him," and that Geary's failure to speak up might well have caused his dismissal.[124] Therefore, Justice Roberts found Geary's dismissal to be arbitrary and not in the interest of public policy. Roberts concluded:

> Contrary to the majority's assertion, society's interest in protecting itself from dangerous products manifestly presents a mandate to the court to recognize a cause of action for wrongful discharge. That a loyal and responsible employee should be summarily and without cause or notice discharged for complying with his d[illegible]municate relevant information to to his superiors provides further justification for affording appellant an opportunity to present his claim. The appellant was discharged for doing that which, had he failed to do, he would have been subject to dismissal with cause amply demonstrates the illogic of the majority's refusal to recognize in these circumstances a cause of action for wrongful discharge.
>
> . . . . . .
>
> Courts are duty-bound to fashion remedies for the changing circumstances of economic and social reality. And it is far too late in the day for this Court to indulge itself by fictionalizing that the doctrine of freedom of contract justifies insulation of an employer's arbitrary and abusive exercise of his power of discharge.[125]

In Abrisz v. Pulley Freight Lines, Inc. the Supreme Court of Iowa refused to decide on whether there should be an exception to the at-will rule because the Court found no violation of public policy.[126] Sharon Abrisz had written a letter which was used in support of a fellow employee's claim for unemployment benefits. She alleged that she was fired by Pulley's Executive Vice-President, John Burroughs, after he learned about the letter.

Justice LeGrand, writing for the Court, examined the trial court's finding that Abrisz's letter was written in good faith but contained four inaccuracies and held that:

> Pulley asserted it had good grounds for firing plaintiff because she made untrue statements reflecting on its integrity. The important fact is that the relationship was destroyed. Under such circumstances Pulley was justified in terminating plaintiff's employment. . . . . We hold plaintiff has not established her discharge violated the public policy of this state. Courts should not declare conduct violative of public policy unless it is clearly so.[127]

In Chin v. American Telephone & Telegraph Company the Supreme Court, Special Term of New York County did not find a violation of public policy when a supervisor for AT&T was fired after driving a van into three police officers during a political demonstration in which Ronald Chin was a participant.[128] AT&T suspended Chin and conducted its own investigation of the incident.

Justice Kassal argued that breach of contract did not apply because Chin was an at-will employee; that a malicious prima facia tort did not apply because any possible malicious motivation was outweighed by AT&T's need to protect its business reputation and the safety of its customers and employees; and that Chin did not establish, ". . . that public policy, derived from or bottomed on New York constitutional, statutory or decisional law, exists that would restrict the right of a private employer to discharge an employee at will due to the employee's political beliefs, activities and associations."[129] On the basis of the

facts, Kassal declined to rule on whether there would be an abusive discharge in violation of public policy exception to the at-will rule in New York. The case was appealed and the decision affirmed.[130]

In Martin v. Platt the Third District Court of Appeals for Indiana declined to find an exception to the at-will rule on general public policy grounds.[131] In the case, Gerald Martin and Keith Neimann, executives for Magnavox, alleged that they were fired in retaliation for reporting to the president of Magnavox, Robert Platt, that Vice-President Alfred de Scipio was soliciting and receiving kickback payments from Magnavox suppliers. Magnavox investigated the charges but no action was taken against the officer.

Judge Garrand declined to create a judicial definition of public policy and argued that: "Such broad determinations should be left for the legislature."[132]

Im McCluney v. Jos. Schlitz Brewing Company the Federal District Court for the Eastern District of Wisconsin held that the abusive discharge exception should not apply where there is no specific statutory definition or where laws defining public policies have their own enforcement mechanisms.[133]

The case arose when Forest McCluney, a 19 year employee of Schlitz, alleged that he was fired, ". . . in retaliation for his opposition to . . . purportedly discriminatory employment practices against females, and specifically because he opposed the defendant's refusal to promote and transfer fellow employee, Lois Rinnie.[139]

Judge Gordon ruled that certain general statutes cited by McCluney did not, ". . . justify a private cause of action in [the] case" and that public policy exceptions based on Wisconsin's Employment Peace

Act and Fair Employment Act[135] would not justify private action because, ". . . [i]t would be contrary to precedent to assume that Wisconsin Courts would imply a private cause of action when the state legislature has already provided enforcement mechanisms to vindicate such policies."[136]

In Keneally v. Orgain the Supreme Court of Montana could not find a public policy exception to the at-will rule but did: ". . . not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee."[137]

Jack Keneally, a 6 year employee for National Cash Register, alleged that he was fired, ". . . not for his lack of sales ability, but because he made complaints to Sterling Orgain and others in the company that service to customers was inadequate and faulty in his territory; that Sterling Orgain wanted to take over Billings' territory which had a greater prospect for sales; and, that Sterling Orgain would profit both from the viewpoint of bonuses and from the commissions which Keneally earned, but which Orgain would receive after Keneally was terminated."[138]

Justice Sheey, writing for the Court, held that there was, ". . . no public policy unless it may be considered that the public is hurt when a corporation allows sales of its machines to be made upon promises of adequate service and maintenance and then fails with respect to the adequate service or maintenance."[139] However, Justice Sheehy, relying on the guidance of Geary v. United States Steel Corporation found that no public policy had been violated.[140]

In Campbell v. Eli Lilly & Co. the First District Court of Appeals of Indiana found a public policy exception can only be made when based on a statutory right or duty.[141] The case arose when James Campbell,

an 11 year researcher and 25 year employee with Eli Lilly, made accusations, through his attorney, of, ". . . various acts of misconduct of the superiors under whom he was assigned . . . ," and that certain drugs being tested were unsafe.[142] Eli Lilly put Campbell on a paid leave of absence and investigated his complaints. Lilly maintained that Campbell's accusations were "totally false," placed him on a leave of absence and then informed him that there was no job for him at Lilly.

Judge Neal ruled that despite the fact that the FDA requires drug testing to be done by the manufacturers, Campbell did not demonstrate ". . . a statutory source for the alleged right he claims to have exercized, nor has he demonstrated a statutory source for the duty he claims to have fulfilled. We do not recognize the general public policy exception urged by Campbell to the venerable at will employment doctrine we reconfirm today."[143]

Judge Ratliff, although concurring in the result, strongly dissented concerning the majority's narrow construction of public policy. Judge Ratliff argued:

> Extension of the "public policy exception" to protect the so-called "responsible whistle-blower" is especially appropriate. A conscientious employee, albeit an employee at will, who, motivated by a sincere desire to further a clear and compelling public policy, either statutorily or judicially declared, calls to the attention of his employer or appropriate authorities facts revealing actual violations of such policy for the purpose of carrying out that clear public policy should not be subjected to retaliatory discharge without being provided with a remedy. The appropriate remedy,

> in my view . . . , is a tort action for damages . . . . Neither crystal ball nor prophetic power is required to discern that if such a whistle-blower may be retaliatorily discharged without recourse, the intimidating effect upon other employees will ensure that the first whistle-blower will also be the last.[144]

In Yainal v. Ingersoll-Rand the Superior Court of Pennsylvania denied an employee a cause of action for wrongful discharge but held that the employee could pursue a cause of action based on interference by his former employers in his efforts to obtain other employment.[145]

The case arose when Charles Yainal, a 29 year employee, alleged that he was asked to transfer, and was then fired after criticizing the inferior manufacture of pump rods and accusing the manufacturing manager of lying to the general manager regarding the inspection of pumps which were being sent to Italy. He further alleged that the head of a division group phoned the recruiter of the Turbo Products Division, where he was seeking a position, and accused him of insubordination to a senior manager which ruined his chances for employment.

Judge Spaeth, writing for the Court, first ruled that: "We are unable, however, to discern any clear public policy that was threatened by appellant's discharge. Although appellant claims that the Italsider pumps posed a serious safety hazard to those working near them, his claim is unsubstantiated."[146] Spaeth upheld the summary judgement of a lower court dismissing the abusive discharge claim. However, Spaeth rejected a summary judgement regarding possible tortious interference with Yainal's further employment with Turbo (although part of the same corporation, ". . . separate enterprises connected only at the highest

level of the company in much the same way that subsidiary corporations are connected by a holding company"). Judge Spaeth held that: "The law . . . accords little, if any, weight to the vindictive spirit, but it affords great weight to the individual's right to earn a living. Thus, a jury could find Bennett's attempt to protect the feelings of SP-AD's senior manager unjustified when compared with its detrimental impact on appellant."[147]

In Rozier v. St. Mary's Hospital the Fifth District Appellate Court of Illinois held that a nurse, who allegedly lied about leaking information to a newspaper concerning the mistreatment of a patient, and was fired, could not maintain a cause of action for retaliatory discharge; and that, absent state action, no claim could be based on First and Fourteenth Amendment free speech rights.[148]

Alice Rozier, an employee of St. Mary's Hospital, alleged that she witnessed abuses and improper conduct by other employees and reported the incidents to her superiors, who took no action. The next day an article appeared in a local newspaper detailing the incidents.

The Administrator of the hospital, Carl Jaeger, testified that he had fired two hospital heads due to the incidents. "One, the head of security, had a conversation with a female patient in her room which involved the subject of oral sex. The other, the head of personnel, was in the same patient's room after regular visiting hours in an intoxicated condition and was removed from the room by Ms. Rozier."[149]

The day after the newspaper article came out, ". . . all staff members on that shift were questioned in an effort to find out who had leaked information to the newspaper. All took polygraph tests."[150] Rozier failed the test and was immediately discharged for lying and re-

vealing confidential information.

Justice Jones first held that there was no cause of action for retaliatory discharge without a specific showing of public policy:

> Plaintiff urges she was fired for showing concern for patients under her care and for exercising her First Amendment right to free speech. Yet, her own testimony shows she denied telling anyone about the December 23 incidents. She then failed a polygraph test when questioned about that denial. On these uncontradicted facts we believe plaintiff's employer was justified in concluding that plaintiff had lied with respect to job-related matters and in terminating her employment on that basis.[151]

Justice Jones then went on to rule out the First and Fourteenth Amendment free speech issues on the basis that they do not apply to private employment absent a showing of state action. Jones then affirmed the lower court's summary judgement for the hospital.

Justice Harrison dissented, arguing that the concept of the retaliatory discharge exception was still evolving and that the facts should be cleared up at trial before a reasoned decision could be made.[152]

In Pierce v. Ortho Pharmaceutical Corporation the Supreme Court of New Jersey carefully defined the scope of retaliatory discharge actions in New Jersey.[153] The case arose when Dr. Grace Pierce, a medical doctor, alleged that she was demoted and held "non-promotable" after objecting to Ortho's plan to file an investigational drug application with the FDA for the drug loperamide--a liquid drug for treatment of diarrhea in infants, children and elderly persons--so that laboratory studies, clinical

testing, and formulation could continue. The drug contained 44 times the amount of saccharin permitted by the FDA in a 12 ounce can of sodawater, and Dr. Pierce considered its safety a subject of medical controversy.

Justice Pollack, writing for the Court, clarified several issues. First, Pollack framed the interest at stake in terms of a balance between employees, employers, and the public: "Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees.[154]

Pollack then provided a broader definition of public policy than that offered by many courts:

> We hold that an employee has a cause of action when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances a professional code of ethics may contain an expression of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient.[155]

Thirdly, Pollack held that a wrongful discharge action could be based in contract or in tort. In each instance, a clear mandate of public policy must be established. With respect to the specific case, Pollack held that:

> An employee does not have a right to continued employment when he or she refuses to conduct research simply because it would contravene his or her personal morals . . . . The thrust of Dr. Pierce's complaint is not that saccharin is dangerous, but that it is controversial . . . . As a matter of law, there is no public policy against conducting research on drugs that may be controversial, but potentially beneficial to mankind, particularly where continuation of the research is subject to approval by the FDA. Consequently, although we recognize an employee may maintain an action for wrongful discharge, we hold there are no issues of material fact to be resolved at trial.[156]

Justice Pollack reversed a lower appellate court and granted summary judgement to Ortho.

Justice Pashman, in strong dissent, agreed with the, ". . . majority's ruling that a professional employee may not be discharged for refusing to violate a clearly recognized legal or ethical obligation imposed on members of his profession . . . ," but felt that the ". . . majority's application of this principle defies logical explanation and disregards established judicial doctrine on the propriety of summary judgement."[157] Peshman would have sent the case down for full trial.

In Adler v. American Standard Corporation the Court of Appeals of Maryland recognized a wrongful discharge exception to the at-will rule and hinted that the exception need not be based on constitutions, statutes, or judicial decisions.[158] However, with regard to the specific facts, the Court found no clear mandate of public policy.

Gerald Adler, an Assistant General Manager of American Standard's

Commercial Printing Division, alleged that he was fired by James Kinealy, Vice President and General Manager of the Division, and James Sinclair, Vice President of the Graphic Arts Group, in retaliation for reporting to them irregularities in the operation of the Commercial Printing Division including bribes, falsification of internal records, misuse of corporate funds by officers for their personal benefit, manipulation of inventory information, and alteration of intra-office financial forecasts; and, after receiving no action, reporting the irregularities to the corporate headquarters. Although Adler had been employed by American Standard for only three years, his salary had been increased from $37,000 to $60,000 per year and he had been complimented for his other suggestions. He also alleged that the corporate headquarters personnel praised his candor, urged him to continue his efforts, and assured him that his position would not be jeopardized for so doing.

Chief Judge Murphy, writing for the Court, held: ". . . Maryland does not recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy . . . ."[159] However, ". . . [a]ccepting the averments of Adler's complaints as true, we think they are too general, too conclusory, too vague and lacking in specifics to mount up to a prima facia showing that the claimed misconduct . . . violated public policy of this state."[160]

In Taylor v. Foremost-McKesson, Inc. a longtime employee of a wine and spirits concern alleged that he was fired after reporting accounting irregularities and possible illegal activities in one of the company's wholesale houses in Florida.[161]

In a per curium opinion, the United States Fifth Circuit Court of

> The regulation of the accounting systems of utilities is not, as is the workers' compensation statute, directed at conferring rights on the employees.[165]

Thus, the summary judgement for the gas company was upheld.

The utility of a tort of wrongful discharge action to an outspoken employee depends on how the courts of each state define the elusive phrase "public policy." Most courts ground their definitions in specific statutes, by requiring that the employee prove that he/she was fired for refusing to break the law, refusing to forsake a statutory right, or insisting upon performing a duty required by statute. The link between an employer's action in firing an employee and the provisions of a specific statute must be direct. There are a few courts, such as the West Virginia Supreme Court,[166] which view employee criticism of illegal practices as public policy but despite Judge Harrison's plea in Rozier v. St. Mary's Hospital,[167] to let the law develop; and strong dissents by Justice Roberts in Geary v. U.S. Steel[168] and Justice Ratliff in Campbell v. Eli Lilly,[169] in praise of whistle-blowing; most employees who seek to report on illegal or immoral action have no remedy if they are fired.

It is ironic that in society at large, freedom of speech is often used to call for legislative action but in private sector employment, a specific statute must first be in place before a tort of wrongful discharge action can be used; and even then the employee often must be fired in direct violation of specific provisions of the act before the tort of wrongful discharge action is allowed. In other words, government rather than the conscience of the individual decides whether or not the topics of particular communicative efforts further public policy. Concerning

Appeals held that:

> Under Georgia law, applicable to this diversity case, a person employed on an "at-will" basis does not have a cause of action for wrongful discharge. The chief issue on appeal is whether Georgia recognizes an exception to this general rule where plaintiff alleges he was terminated in an attempt by corporate officers to cover up illegal activities. Finding Georgia does not, we affirm the grant of defendant corporation's motion for summary judgement.[162]

In Suchodolski v. Michigan Consolidated Gas Company the Supreme Court of Michigan found that neither the Code of Ethics of the Institute of Professional Auditors nor the state's pervasive role in utility rate setting constituted a clear public policy interest in the complaints of a senior auditor.[163] Arthur Suchodolski alleged that he was terminated by the Michigan Consolidated Gas Company for attempting to report and correct such questionable management practices as, ". . . the shifting of losses from appliance sales to the rate payers, uncollectible accounts receivable and the selling of automobiles and office equipment to employees of defendant corporation for very low prices.[164]

In a per curium opinion, the Court held that:

> . . . this case involves only a corporate management dispute and lacks the kind of violation of a clearly mandated public policy that would support an action of retaliatory discharge. The code of ethics of a private association does not establish public policy. Nor is the regulation of the accounting systems of the utilities sufficient to sustain the plaintiff's action.

the speech of private sector employees, the public has no right to know.

III. CONTRACT REMEDIES

Most courts which have established exceptions to the at-will rule have relied on tort theory. However, several courts have limited the at-will rule through breach of contract actions. These courts have not been constrained by the mutuality of obligation theory, and have not demanded extra consideration in addition to the employee's labor, before at-will employment could be treated like other types of contracts. Currently, some states find that unjust dismissal is a tort problem, a contract problem, or a problem that sounds both in tort and in contract. Only a few states recognize the breach of contract exception to the at-will rule.

Perhaps the most influential case was a 1974 New Hampshire ruling on sexual harassment. In Monge v. Beebe Rubber Co. the Supreme Court of New Hampshire found that an at-will employee could have a breach of contract action against her employers for a general definition of public policy.[170]

Olga Monge was a former Costa Rican school teacher, who was working as a machine operator for Beebe Rubber Company in order to attend college five nights a week so that she could qualify as a teacher in New Hampshire. Shortly after she was promoted to operate a different machine at a better rate of pay, she alleged that, ". . . her foreman then asked her to go out with him, which she refused to do because she was married and had three children . . . . [S]ome time after [she] had refused her fore-

man's advances, the personnel manager visited her at home about some annoying telephone calls she was receiving. In the course of their conversation, he told her he knew her foreman used his position to force his attention on the female employees under his authority and asked her 'not to make trouble'."[171] After transfer to several jobs with lower pay she became ill and was found unconscious in the ladies' room and was hospitalized. Shortly thereafter she was terminated for absence without reporting in.

Justice Lampron, writing for the Court, first held that: "the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his . . . a proper balance between the two."[172] Lampron then went on to hold that: "A termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[173] The case, which was dismissed by the lower court, was remanded back for trial.

Justice Grimes dissented. Grimes clung to the at-will doctrine and refused to ". . . subscribe to the broad new unprecedented law laid down in this case."[174]

The Monge Court expressed a very broad general concern about public policy but was also concerned that the employee was treated fairly. These two interests have evolved into two basic types of breach of contract cases. The first type concerns employees being treated with good faith and fair dealing even when their contracts are at-will. In these cases public policy is not the key concern and may not even come up in the case. The second type involves contracts breached in violation of

public policy considerations.

Good Faith and Fair Dealing

A few courts have ruled that employers and employees must exercise good faith and fair dealing toward each other. Although the application of this concept is new to at-will employees, at least one court defines it as a requirement that employers and employees not violate community standards of "decency, fairness and responsibleness."[173] So far, this construction has only been applied to salary and bonus disputes; accusations of theft; and labor disputes. However, this definition may soon be used to cover whistle-blowing and other general communicative behaviors not directly linked to any statute.

In Fortune v. National Cash Register Company Orville Fortune, an at-will employee, alleged that he had been discharged by NCR so that it could avoid paying Fortune certain bonuses.[176] The Supreme Judicial Court of Massachusetts ruled that there was a breach of contract. Justice Abrams, writing for the Court, held:

> We believe that the holding in the Monge case merely extends to employment contracts the rule that "in every case there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing" . . . . In the instant case, we need not pronounce our adherence to so broad a policy nor need we speculate as to whether the good faith requirement is implicit in every contract for employment at will.[17

In Magnan v. Anaconda Industries, Inc. a 13 year at-will employee, George Magnan, brought a breach of contract action. He alleged that, during a labor disruption, he was questioned by the company about his involvement in a theft of refrigerators, asked to sign an untrue statement concerning the theft, and was suspended and later dismissed after refusing to sign.[178]

Judge Berdon, for the Superior Court of Connecticut-Waterbury, held that contracts had been, ". . . elevated from the laissez-faire of the marketplace to that level which requires that the parties not violate community standards of decency, fairness and responsibleness . . . ," and that Magnan be given an opportunity to establish that the breach was the result of "'. . . fraud, deceit, or misrepresentation.'"[179] Berdon denied summary judgement on the issue.

In Cleary v. American Airlines, Inc. the California Second District Court of Appeals ruled that dismissal, without a proper investigation, violated an implied covenant of good faith and fair dealing.[180]

Lawrence Cleary was employed, at-will, by American Airlines during an 18 year period as a payroll clerk, ramp agent and an airport operations agent. He alleged that the airline fired him for various violations of rules--without a fair hearing--but that the real reason for the discharge was his union organizing activity.

Justice Jefferson, writing for the Court, ruled that:

> In the case at bench we hold that the longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without just cause. We recognize, of course, that plaintiff has the burden of proving that

> he was terminated unjustly, and that the employer, American Airlines, will have its opportunity to demonstrate that it did in fact exercise good faith and fair dealing with respect to the plaintiff.[181]

Public Policy

The second type of breach of contract action is based on public policy and, in this regard, is almost indistinguishable from the tort of wrongful discharge actions. The only major difference is the lack of punitive damages which are available in tort actions.

In O'Sullivan v. Mallon Francis O'Sullivan brought a breach of contract action against her employers after she was allegedly fired from Washington Memorial Hospital for refusing to perform catheterizations. She was not properly trained to perform them and such a procedure can only be legally done by a licensed nurse or physician.[182] After her discharge, ". . . the New Jersey Board of Medical Examiners concluded that such an act performed by her would be in violation of the Medical Practices Act . . . [and] the State Board of Nursing issued a cease and desist order [to the hospital] forbidding the performance of catheterizations by persons not licensed as nurses."[183]

Judge Rossetti, writing for the Superior Court of New Jersey, held that: "The public policy of the State of New Jersey may require that this State adopt the rule . . . that an employment at will may not be terminated by an employer in retaliation for an employee's refusal to perform an illegal act. This rule is especially cogent where the subject matter is the administration of medical treatment, an area in which the public has a foremost interest and which is extensively regulated by

state agencies."[184] Rossetti then denied the defendant's motion for dismissal.

In McNulty v. Borden, Inc. the United States District Court for the Eastern District of Pennsylvania refused to grant a motion to dismiss a breach of contract case based on public policy.[185]

John McNulty was a Unit Manager and 15 year employee of the Borden Foods Division. He alleged that, among other things, he was fired after he refused to participate in, ". . . special pricing arrangements, which included the granting of free foods and certain price reductions to certain accounts such as Food Fair, but not to others such as Acme Markets."[186] He believed these practices to be illegal under the Clayton Anti-Trust Act.[187] His supervisor "compiled a file" on him and he was fired in a meeting which took place in a hotel. He was offered, ". . . 8 weeks severence pay in return for his release of all claims against the [employer] and his agreement not to disclose any information concerning the special pricing arrangements."[188]

In a memorandum decision, Judge Broderick ruled:

> [P]laintiff has alleged that a clear mandate of public policy has been violated by the discharge for two reasons. Plaintiff contends first that he was discharged because of his refusal to commit a crime, and, second, that his discharge was an act in furtherance of the allegedly illegal pricing scheme . . . . Defendant's motion to dismiss Count II of the complaint for failure to state a claim upon which relief can be granted must, therefore, be denied.[189]

The states which recognize the breach of contract exceptions to the

at-will rule represent a tiny minority. Yet, exceptions based on contract theory perhaps offer a greater potential for communication protection than exceptions based on tort theory.

Those courts which require a showing of public policy in breach of contract actions are little different than courts which allow tort of wrongful discharge actions. However, decisions in such cases as Monge, Fortune, Magnan, and Cleary might open the door to greater protection of the communication of at-will employees. To avoid the restrictive concept of public policy, courts might use the more flexible concept of good faith and fair dealing to deter employers from firing employees in situations where the firing would offend community, or, in some cases, custom of trade standards.

The Cleary v. American Airlines, Inc. decision might prove to have the greatest impact, because by requiring that an at-will employee be fired only for cause when the employee has long service with the employer, the California Second District Court of Appeals undermines the mutuality of obligation concept which is at the heart of the at-will rule.[190]

IV. CONCLUSIONS

The erosion of the at-will rule through tort and contract law exceptions is not a panacea for outspoken employees. First, most states do not make any exceptions to the at-will rule. Secondly, tort of wrongful discharge actions are limited to instances where employees are fired for refusing to perform an illegal act, exercising a statutory right, or attempting to perform a statutory duty. Seldom will an employee be allowed to pursue a tort of wrongful discharge after being fired for

complaining to the employer or whistleblowing to the outside. Thirdly, the promising, but rarely recognized breach of contract actions usually require a clear showing of statutorily defined public policy, as in tort actions. Courts which do not require that narrow construction of public policy are extremely rare.

Communication in private organizations is often suppressed in ways that would be unconscionable if done by government in society at large. The recent erosion of the at-will rule offers a remedy for only the most extreme abuses, and then only in a minority of states. In theory, an employee can ensure that he or she is fired only for good cause by bargaining for a contract of a definite term. In reality, few at-will employees have the bargaining power or foresight to bargain for a contract for a fixed term.

In special cases, Congress and the state legislatures have sought to protect discrimination based on race, sex,[191] union organizing,[192] age,[193] and even indebtedness.[194] A few states have taken the first bold steps toward free speech rights.[195] Yet in all cases, these rights are far more limited than free speech in society at large.

The central question raised by the legislatures and the courts is: can employee rights be expanded without endangering industrial efficiency? The experience of, ". . . Great Britain, France, Germany, Japan, Italy, Sweden, and Canada--all of which have enacted 'just cause' legislation for private as well as public sector employees--suggests that industrialized societies can function efficiently with a system that protects against abusive discharge."[196] In the United States, we have only begun to explore the frontiers of industrial freedom.

Notes

[1] Kenneth Walters, "Employee Freedom of Speech," Industrial Relations, 15 (1976), p. 38.

[2] Phillips v. Goodyear, 651 F.2d 1051 (5 Cir. 1981).

[3] Gil v. Metal Service Corp., 412 So.2d 706 (1982).

[4] Bender Ship Repair, Inc. v. Stevens, 379 So.2d 594 (1980).

[5] Geary v. U.S. Steel, 319 A.2d 174 (1974).

[6] Suchodolski v. Michigan Consolidated Gas Company, 316 N.W.2d 710 (1982).

[7] Adams v. Fitzpatrick, 26 N.E. 143 (1881); Davis v. Gorton, 16 N.Y. 255 (1857); Bascom v. Shillito, 37 Ohio St. 431 (1882); Jay Feinman, "The Development of the Employment At Will Rule," American Journal of Legal History, 20 (1976) 118-35.

[8] Horace Wood, Master and Servant, 1886, note 39 at § 134 as quoted in Feinman, p. 126.

[9] Feinman, p. 126.

[10] See the theories in: Charles Brake, Jr., "Limiting the Right to Terminate At Will -- Have the Courts Forgotten the Employer?" Vanderbilt Law Review, 35 (1982) 201-34; "The Employment At Will Rule," Alabama LR, 31 (1980) 421-57; Feinman.

[11] 208 U.S. 161 (S.Ct. 1908).

[12] 236 U.S. 1 (S.Ct. 1915).

[13] 301 U.S. 1 (S.Ct. 1937).

[14] Lawrence Blades, "Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," Columbia Law Review, 67 (1967), p. 1435.

[15] See: Cornelius Peck, "Unjust Discharges from Employment: A Necessary Change in the Law," Ohio State L.J., 40 (1979); Samuel Estreicher, "At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response," New York State B.J., 54 (1982) 146-9, 170-5; Clyde W. Summers, "Individual Protection Against Unjust Dismissal: Time for a Statute," Virginia LR, 62 (1976) 481-532; Phillip I. Blumberg, "Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry," Oklahoma LR, 24 (1971) 279-318.

[16] For example see: Rowe v. Noren Pattern and Foundry Company, 283 N.W.2d 713 (Mich. 1979); AFL-CIO v. University of Alabama, 599 F.2d 56 (Al. 1979).

[17] Blades, p. 1419.

[18] For example see: Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); Fortune v. National Cash Register Company, 364 N.E.2d 1251 (Mass. 1977); Mc Nulty v. Borden, Inc., 474 F. Supp IIII (EDPA 1979); Magnan v. Anaconda, 429 A.2d 492 (Conn. 1980); Cleary v. American Airlines, Inc., 168 Cal.Rptr. 722 (1980).

[19] "Employment At Will Rule," p. 45.

[20] 344 P.2d 25 (Cal. 1959).

[21] 344 P.2d 25, 27.

[22] 344 P.2d 25, 28.

[23] 265 N.W.2d 385, 388 (Mich. 1978).

[24] 265 N.W.2d 385, 388.

[25] 265 N.W.2d 385, 389.

[26] 610 P.2d 1330, 1332 (Cal. 1980).

[27] United States v. The American Oil Company et. al., (D.N.J. 1971) Civ. No. 370-65.

[28] 610 P.2d 1330, 1336.

[29] 610 P.2d 1330, 1334.

[30] 400 F. Supp. 1322 (1977).

[31] 539 F.2d 1126.

[32] 400 F. Supp. 1322, 1324.

[33] 400 F. Supp. 1322, 1324.

[34] 319 A.2d 174 (Pa. 1974).

[35] 400 F. Supp 1322, 1324.

[36] 315 A.2d 549 (N.H. 1974).

[37] 539 F.2d 1126 (1976).

[38] 400 F. Supp 1322, 1324

[39] 568 P.2d 764 (Wash. 1977).

[40] 568 P.2d 764, 767.

[41] 568 P.2d 764, 770.

[42] 316 A.2d 549 (N.H. 1974).

[43] 568 P.2d 764, 770.

[44] 651 F.2d 1051.

[45] 651 F.2d 1051, 1053.

[46] 651 F.2d 1051, 1053.

[47] 651 F.2d 1051, 1056.

[48] 651 F.2d 1051, 1056.

[49] 651 F.2d 1051, 1057.

[50] 412 So.2d 706, 707.

[51] 412 So.2d 706, 707.

[52] 412 So.2d 706, 708.

[53] For example see: Cal. Labor Code § 1102; Whistleblowers' Protection Act, Mich. C.L.A. §§ 15 361-69; Civil Service Reform Act of 1978, 5 U.S.C.A. § 2301 (b)(9).

[54] 297 N.E.2d 425 (1973).

[55] 297 N.E.2d 425, 427.

[56] 297 N.E.2d 425, 428.

[57] 245 N.W.2d 151 (1976).

[58] 245 N.W.2d 151, 153.

[59] 245 N.W.2d 151, 154-5.

[60] 245 N.W.2d 151, 156.

[61] 366 N.E.2d 1145 (1977).

[62] 366 N.E.2d 1145, 1146.

[63] 384 N.E.2d 353 (1979).

[64] 384 N.E.2d 353, 357 (1979).

[65] Ill. Rev. Stat. 1975 Ch. 38, par. 1005-9-1 (4).

[66] 270 S.E.2d 178 (1980).

[67] W.Va. Code 1931, 55-2-6, 55-2-12.

[68] 270 S.E.2d 178, 182.

[69] 246 S.E.2d 270 (1978).

[70] 270 S.E.2d 178, 184.

[71] 428 S.E.2d 1317 (1981).

[72] 428 A.2d 1317, 1318.

[73] 312 N.W.2d 381 (1981).

[74] 245 N.W.2d 151 (1976).

[75] 312 N.W.2d 381.

[76] 312 N.W.2d 381.

[77] See: Blevins v. General Electric Co., 491 F. Supp 521 (Va. 1980); Segal v. Arrow Industries Corp., 364 So.2d 89 (Fla. 1978); Martin v. Tapley, 360 So.2d 134 (Al. 1978); Rockery v. Lampert Table Co., 244 S.E.2d 272 (N.C. 1978).

[78] 245 N.W.2d 151.

[79] 270 S.E.2d 178.

[80] 245 N.W.2d 151

[81] 384 N.E.2d 353.

[82] 536 P.2d 512 (1975).

[83] 536 P.2d 512, 516.

[84] 386 A.2d 119 (1978).

[85] 386 A.2d 119, 120.

[86] 427 A.2d 385 (1980).

[87] 427 A.2d 385, 386.

[88] Conn. G.S.A. § 19-222.

[89] 319 A.2d 178 (1974).

[90] 427 A.2d 385, 388.

[91] 427 A.2d 385, 389.

[92] 427 A.2d 385, 390.

[93] 427 A.2d 385, 390.

[94] 421 N.E.2d 876 (1981).

[95] 421 N.E.2d 876, 879.

[96] 421 N.E.2d 876, 878.

[97] 421 N.E.2d 876, 880.

[98] 421 N.E.2d 876, 881.

[99] 421 N.E.2d 876, 881.

[100] 421 N.E.2d 876, 885.

[101] 443 A.2d 728 (1982).

[102] 443 A.2d 728, 729.

[103] 443 A.2d 728, 731.

[104] 417 A.2d 505 (1980).

[105] 443 A.2d 728, 730.

[106] 427 A.2d 385 (1980).

[107] 443 A.2d 728 (1982).

[108] 536 P.2d 512 (1975).

[109] 386 A.2d 119 (1978).

[110] 421 N.E.2d 876 (1981).

[111] 427 A.2d 385, 390.

[112] For an example of such practice see: Rozier v. St. Mary's Hospital, 411 N.E.2d 50 (1980) where the staff of an entire shift was interrogated and given polygraph tests in an effort to find out who leaked confidential information about alleged improprieties with a female patient.

[113] 421 N.E.2d 876, 881-5.

[114] 246 S.E.2d 270, 275 (1978).

[115] 246 S.E.2d 270, 276.

[116] 289 S.E.2d 270, 276.

[117] 447 N.Y.S.2d 218 (1982).

[118] 447 N.Y.S.2d 218, 219.

[119] 319 A.2d 174 (1974).

[120] 319 A.2d 174, 175.

[121] 319 A.2d 174, 178.

[122] 319 A.2d 174, 179-80.

[123] 319 A.2d 174, 181.

[124] 319 A.2d 174, 181.

[125] 319 A.2d 174, 184-5.

[126] 270 N.W. 454 (1978).

[127] 270 N.W. 454, 456.

[128] 410 N.Y.S.2d 737 (1978).

[129] 410 N.Y.S.2d 737, 741.

[130] 416 N.Y.S.2d 60 (1979).

[131] 386 N.E.2d 1026 (1979).

[132] 386 N.E.2d 1026.

[133] 489 F. Supp 24 (1980).

[134] 489 F. Supp 24, 25.

[135] Wis. Stats. §§ 111.01-111.03.

[136] 489 F. Supp 24, 27.

[137] 606 P.2d 127, 130 (1980).

[138] 606 P.2d 127, 128.

[139] 606 P.2d 127, 129-30.

[140] 319 A.2d 174 (1974).

[141] 413 N.E.2d 1054 (1980).

[142] 413 N.E.2d 1054, 1055.

143 413 N.E.2d 1054, 1061.

144 413 N.E.2d 1054, 1067.

145 422 A.2d 611 (1980).

146 422 A.2d 611, 620.

147 422 A.2d 611, 624.

148 411 N.E.2d 50 (1980).

149 411 N.E.2d 50, 52.

150 411 N.E.2d 50, 52.

151 411 N.E.2d 50, 54.

152 411 N.E.2d 50, 55.

153 417 A.2d 505 (1980).

154 417 A.2d 505, 511.

155 417 A.2d 505, 512.

156 417 A.2d 505, 514.

157 417 A.2d 505, 514.

158 432 A.2d 464 (1981).

159 432 A.2d 464, 473.

160 432 A.2d 464, 471.

161 656 F.2d 1029 (1981).

162 656 F.2d 1029, 1030-1.

163 316 N.W.2d 710 (1982).

164 316 N.W.2d 710, 711

165 316 N.W.2d 710, 711.

166 Harless v. First National Bank in Fairmont, 246 S.E.2d 270 (1978).

167 411 N.E.2d 50 (1980).

168 319 A.2d 174 (1974).

169 413 N.E.2d 1054 (1980).

170 316 A.2d 549 (1974).

171 316 A.2d 549, 551.

172 316 A.2d 549, 551.

173 316 A.2d 551.

174 316 A.2d 549, 553.

175 Magnan v. Anaconda Industries, Inc., 429 A.2d 492 (1980).

176 364 N.E.2d 1251 (1977).

177 364 N.E.2d 1251, 1257.

178 429 A.2d 492 (1980).

179 429 A.2d 492, 494.

180 168 Cal. Rptr. 722 (1980).

181 168 Cal. Rptr. 722, 729.

182 390 A.2d 149 (1978).

183 390 A.2d 149.

184 390 A.2d 149, 150.

185 474 F. Supp 1111 (1979).

[186] 474 F. Supp 1111, 1114.

[187] 15 U.S.C.A. § 13, 15.

[188] 474 F. Supp 1111,1114.

[189] 474 F. Supp 1111, 1115.

[190] 168 Cal. Rptr. 722 (1980).

[191] 42 U.S.C. § 2000e-2.

[192] 29 U.S.C. §§ 157, 158 (a)(3).

[193] 29 U.S.C. § 623 (a).

[194] 15 U.S.C. § 1674 (a).

[195] See: Cal. Labor Code § 1102; Mich. C.L.A. §§ 15 361-69.

[196] Samuel Estreicher, "At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response," New York State Bar Journal, 54 (1982), p. 172.